a. There is no dispute that in a summons enforcement proceeding the United States has the initial burden of meeting the requirements established in *Powell*. See, *e.g.*, *United States* v. *Huckaby*, 776 F.2d 564, 569 (5th Cir. 1985), cert. denied, 475 U.S. 1085 (1986). If the United States meets its burden, as petitioner concedes it has done (*e.g.*, C.A. App. 87), however, the burden shifts to the defendant to "challenge the summons on any appropriate ground." *Powell*, 379 U.S. at 58 (quoting *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964)); see *United States* v. *Rylander*, 460 U.S. 752, 757 (1983) (challenge to enforcement of IRS summons on ground of "lack of possession or control of records" cannot be raised "for the first time in a contempt proceeding"). Petitioner contested enforcement here on the ground that he did not have possession of the CNB records at the time the summons was served. C.A. App. 150 ¶ 8. As the court of appeals correctly held, the summoned party bears the burden of establishing lack of possession or control. See *United States* v. *Lawn Builders of New England, Inc.*, 856 F.2d 388, 392 (1st Cir. 1988) (per curiam) ("[O]nce the district court has reason to believe that the requested documents exist, the burden then shifts to the summonee to show that he is not in possession of them.") (internal quotation marks omitted); *Huckaby*, 776 F.2d at 567 ("the party resisting enforcement bears the burden of producing credible evidence that he does not possess or control the documents sought"); cf. *Rylander*, 460 U.S. at 757 ("It is settled * * * that in raising this defense [of inability to comply with an order enforcing an IRS summons], the defendant has a burden of production.").

Placing the burden on the party asserting lack of possession as a defense to a prima facie valid summons, see *Powell*, 379 U.S. at 58, makes eminent sense because that party is privy to the facts that would support such a de-

fense. As this Court explained long ago in the context of a prosecution of the defendant arising out of her refusal to produce subpoenaed records:

> [T]he prosecution is under a serious practical handicap if it must prove the negative proposition—that respondent did not or had no good reason for failing to try to comply with the subpoena insofar as she was able. The possibilities of time and circumstance are of such wide range as to defy inclusive rebuttal. On the other hand, the burden of the affirmative was not an oppressive one for respondent to undertake; the relevant facts are peculiarly within her knowledge.

United States v. *Fleischman*, 339 U.S. 349, 362-363 (1950) (cited in *Rylander*, 460 U.S. at 757).

Petitioner may not avoid this burden by broadly invoking the Fifth Amendment. See Pet. 15-19. As an initial matter, this is not a case in which petitioner invoked the Fifth Amendment as a basis for declining to reveal whether he had possession of the records at issue in this appeal. To the contrary, petitioner voluntarily submitted an affidavit in which he asserted that "I do not possess any documents pertaining to those [specified] accounts." C.A. App. 150 ¶ 8. Petitioner evidently did not believe that this assertion was incriminating. See *ibid.* By contrast, with respect to "all other items set forth without specification," *id.* at 150-153 ¶¶ 9-19, petitioner refused "to state whether there are any such documents within my possession, custody or control." He also asserted with respect to those "other items" that, if he had "such records" in his possession, he would decline to produce them on the ground that their production would tend to incriminate him. *Ibid.* Petitioner's affidavit reflects a conscious decision on his part regarding the circumstances in which he would raise a Fifth Amendment objec-

tion. See also *id.* at 18-19, 22-23; Gov't C.A. Br. 19-22. His failure to assert in the district court that the Fifth Amendment protected him from having to make assertions about possession or control of the documents sought, on the theory that such assertions could be incriminating, fatally undermines any claim that placing the burden of proof on him on remand would violate the Fifth Amendment.

Moreover, it is not apparent how testimony that petitioner does not possess or have control over his bank account and credit card records would tend to incriminate him. Indeed, petitioner has *never* laid any foundation for a claim that testimony regarding his asserted lack of possession or control of those records would tend to incriminate him. See *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) (The taxpayer's "say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified."). The broad Fifth Amendment challenge that petitioner seeks to raise before this Court thus is not properly presented in this case.

In any event, "the assertion of the Fifth Amendment privilege against compulsory self-incrimination * * * has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production." *Rylander*, 460 U.S. at 758. Indeed, this Court has "squarely rejected the notion * * * that a possible failure of proof on an issue where the defendant had the burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." *Ibid.* Petitioner's claim that the Fifth Amendment is violated by imposition of a burden of proof on summons recipients "would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in

support of a burden which would otherwise have been his. None of [this Court's] cases support this view." *Ibid.*; see *e.g.*, *Williams* v. *Florida*, 399 U.S. 78, 84 (1970) ("That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination"). And as the Court has further observed, "[a] subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, * * * the great power of testimonial compulsion * * * would be a nullity." *Rylander*, 460 U.S. at 762 (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)).

Petitioner's reliance (Pet. 15) on *Curcio* v. *United States*, 354 U.S. 118 (1957), is misplaced. In *Curcio*, the Court held that a union official's personal privilege against self-incrimination attached to questions regarding the location of union books and workpapers that he had refused to produce in response to a subpoena. See *id.* at 128. The Court explained that holding the official in contempt for refusing to answer questions about the whereabouts of the subpoened records would violate his Fifth Amendment rights because "forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind." *Ibid.* At the same time, however, the Court made clear that the records custodian, who claimed that the records were not in his possession, "might have been proceeded against for his failure to produce the records demanded." *Id.* at 127 n.7. Thus, the Court drew a distinction "between oral testimony and other forms of incrimination," *Braswell* v. *United States*, 487 U.S. 99, 114 (1988), and nothing in *Curcio* indicates that there would be anything improper in enforcing the summons "on the basis of [petitioner's] failure to introduce evidence on an

issue on which he had the burden of production." *Huckaby*, 776 F.2d at 569.[6]

b. Petitioner contends (Pet. 19) that the circuits are divided on the question of which party bears the burden of proof with respect to the defense of lack of possession or control. Petitioner is mistaken. The cases on which he relies address the distinct question whether non-compliance with a summons may be excused on the ground that the act of producing the documents will incriminate the taxpayer. In *United States* v. *Rue*, 819 F.2d 1488 (8th Cir. 1987), a taxpayer challenged a contempt finding on the ground that compliance with the summons would have violated his Fifth Amendment privilege against self-incrimination because, by producing the summoned documents (records relating to his dentistry practice), he "would acknowledge the exis-

---

[6] Petitioner's reliance on *In re Grand Jury Subpoena Dated April 9, 1996*, 87 F.3d 1198, 1204 (11th Cir. 1996), is misplaced for the same reason. There, the district court had held a custodian of corporate records in contempt for refusing to testify about the whereabouts of the subpoenaed records, which she had previously indicated were not in her possession. The Eleventh Circuit reversed, holding that the custodian "may not be compelled to testify as to the location of documents not in [her] possession," *id.* at 1202, and that the custodian's assertion that she did not possess the records did not waive her privilege with respect to providing testimony regarding their current location, *id.* at 1202-1204. The court of appeals here did not hold that petitioner could be compelled to testify about the present location of the documents, nor did it hold that petitioner waived his Fifth Amendment rights as to the whereabouts of the documents by asserting non-possession. Moreover, it is far from clear that the Eleventh Circuit disagrees with the court of appeals' holding here on the burden of proof to establish non-possession. See *United States* v. *Roberts*, 858 F.2d 698, 701 (11th Cir. 1988) ("[The taxpayer] raised the issue of possession in his answer to the Service's petition for an enforcement order, but *he failed to sustain the allegation* at the hearing before the magistrate.") (emphasis added).

tence of the documents, his possession of them, and their authenticity." *Id.* at 1491. The Eighth Circuit rejected that challenge, upholding the district court's finding that his act of production would not incriminate him because "the existence, possession, and authenticity of the documents" were a "foregone conclusion" under *Fisher* v. *United States*, 425 U.S. 391, 411 (1976) (holding that taxpayers' Fifth Amendment privilege against self-incrimination is not violated by enforcement of a summons against the taxpayers' attorneys because "the existence and location of the papers are a foregone conclusion" and thus compliance with the summons "adds little or nothing to the sum total of the Government's information"). 819 F.2d at 1493-1494.

With respect to the district court's "foregone conclusion" finding, the *Rue* court noted that the government bears the burden of proof "on the questions of the existence, possession, and authenticity of the summoned documents." 819 F.2d at 1493 n.4. The court did *not* hold, however, that the government also bears the burden of proof with respect to the distinct question whether the summons recipient should be excused from production on the ground that he is simply unable to comply because he lacks custody or control of the documents. That question was not at issue in *Rue*, and accordingly the court did not address it.

The other decisions cited by petitioner in support of his claim of a circuit conflict (Pet. 19) are inapposite for the same reason. Each addressed the government's burden in the context of the "foregone conclusion" issue, not the allocation of the burden when a summons recipient claims he is unable to comply because he lacks possession or control of the documents—the only burden-allocation issue addressed by the court of appeals in this case. Compare Pet. App. 6a with *In re Grand Jury Proceedings, Subpoenas for Documents*, 41 F.3d 377, 380-381 (8th Cir. 1994) (holding that the

government did not meet its burden of establishing that taxpayers' act of production was insufficiently testimonial because a "response to [the] broad-sweeping subpoena may involve discretionary judgments"); *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 910-913 (9th Cir. 2004) (same); *In re Grand Jury Subpeona Duces Tecum Dated October 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993) (rejecting Fifth Amendment act-of-production claim because the government "demonstrate[d] with reasonable particularity that it knows of the existence and location of subpoenaed documents") (internal quotation marks omitted). Contrary to petitioner's suggestion, the decision below thus does not conflict with the *Rue* line of cases. Petitioner's contentions regarding the allocation of the burden of proof with respect to a taxpayer's claim that he lacks possession of summoned records thus do not merit further review.

3. Contrary to petitioner's contention (Pet. 5-13), the court of appeals' "observation[]" that petitioner's act of producing the CNB records "would have no testimonial significance" does not conflict with this Court's decisions in *Fisher*, *United States* v. *Hubbell*, 530 U.S. 27 (2000), or *Doe* v. *United States*, 487 U.S. 201 (1988).[7] In *Fisher*, the IRS had issued a summons to taxpayers' attorneys seeking the production of documents created by the taxpayers' accountants. While recognizing that "[t]he act of producing evi-

[7] Petitioner also mistakenly contends (Pet. 8-9) that the court of appeals' decision is in conflict with *Kastigar* v. *United States*, 406 U.S. 441 (1972), which held that the government may compel testimony by granting immunity that prevents the government from using the testimony or its fruits in a criminal proceeding. This case involves a requirement to meet a burden of proof in a civil summons enforcement proceeding, not an order compelling testimony. In addition, under the court of appeals' view on the "foregone conclusion" issue, petitioner would have no legitimate basis to invoke the Fifth Amendment. Accordingly, *Kastigar* is irrelevant.

dence in response to a subpoena" may have "communicative aspects," 425 U.S. at 410, this Court held that because "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers," enforcement of the summons did not violate the taxpayers' Fifth Amendment privilege against self-incrimination, *id.* at 411. The Court explained that, in the circumstances presented, "[t]he question is not of testimony but of surrender." *Ibid.* (quoting *In re Harris*, 221 U.S. 274, 279 (1911)). The same is true in this case, where petitioner's act of production would add nothing to the government's knowledge. The existence and location of records pertaining to petitioner's CNB bank and credit card accounts are a foregone conclusion, because the accounts have already been either disclosed by the petitioner or discovered through independent investigation by the IRS. See Pet. App. 6a-7a.

In *Hubbell*, the Court held that, in contrast to *Fisher*, the act of production required of the respondent was testimonial and protected by the Fifth Amendment because the government failed to show "that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent" (530 U.S. at 45), and because it was "necessary for respondent to make extensive use of 'the contents of his own mind'" (*id.* at 43 (quoting *Curcio*, 354 U.S. at 128)) to comply with the government's "broadly worded" subpoena. *Id.* at 42. Petitioner's contention (Pet. 13) that he must "use his mind * * * to convince CNB to release the records to him" hardly equates with using "the contents of his own mind" within the meaning of *Hubbell*. A request that CNB release the records pertaining to the three identified accounts would not be testimonial. Such a request would seek action,

not impart information. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Pennsylvania* v. *Muniz*, 496 U.S. 582, 589 (1990) (quoting *Doe*, 487 U.S. at 210). As petitioner would not be required to relate any information to CNB that the government does not already possess, see p. 2, *supra*, any communication with CNB would not be testimonial and would thus not be protected under the Fifth Amendment.

Finally, in *Doe*, the United States sought to compel the target of a federal grand jury investigation to sign a consent directive to be sent to banks in the Cayman Islands and Bermuda directing the banks to "disclose all information and deliver [to the Grand Jury] copies of all documents of every nature in your possession or control which relate" to any bank account on which he was authorized to draw. *Doe*, 487 U.S. 202-205 & n.2 (citation omitted). The consent directive did not identify any particular account owned by Doe. The Court upheld a finding of contempt against Doe for refusing to execute the consent directive, rejecting his contention that forcing him to sign the consent directive violated his Fifth Amendment rights. The Court found that the consent directive itself was not testimonial because the government was "not relying on the 'truthtelling' of Doe's directive to show the existence of, or his control over, foreign bank account records." *Id.* at 215 (quoting *Fisher*, 425 U.S. at 411).

Petitioner mistakenly contends (Pet. 11) that requiring him to obtain the CNB records "by whatever means" (the language used in the district court's now-vacated order) conflicts with *Doe* because it requires more of him than the Court required of Doe and it "necessarily requires him to make a 'testimonial communication' to CNB in order to

convince it to comply." As discussed above, any communication with CNB would not include any information that the government does not already have. Because the government is aware of petitioner's CNB accounts, both through its own efforts and from petitioner's voluntary disclosures, and because a court may take judicial notice that banks keep records of such accounts, see *Kaggen* v. *IRS*, 71 F.3d 1018, 1020 (2d Cir. 1995), petitioner's privilege against compelled self-incrimination will not be violated by his requesting CNB to supply him with the records pertaining to those identified accounts. *Doe*, 487 U.S. at 216-217. See, *e.g.*, *United States* v. *Teeple*, 286 F.3d 1047, 1050-1051 (8th Cir. 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

FRANK P. CIHLAR
RANDOLPH HUTTER
Attorneys

MAY 2006